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Groomed for Exploitation! How Applying the Statutory Definition of Employee to Cover Division IA College Football Players Disrupts the Student-Athlete Myth

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**GROOMED FOR EXPLOITATION!
HOW APPLYING THE STATUTORY DEFINITION OF
EMPLOYEE TO COVER DIVISION IA COLLEGE FOOTBALL
PLAYERS DISRUPTS THE STUDENT-ATHLETE MYTH**

*Anne Marie Lofaso**

I.	INTRODUCTION.....	958
II.	WHAT IS EXPLOITATION?	962
III.	THE EXPLOITATION OF YOUNG ATHLETES: A SNAPSHOT OF THE BRUTALITY AND COMMERCIALIZATION OF HIGH SCHOOL AND COLLEGE FOOTBALL	965
	<i>A. American Football Player Side: A Dangerous Sport with Negligible Prospects for Future Earnings</i>	966
	<i>B. College Football's Business Side: The Arms Race</i>	969
IV.	TWO CATALYST CASES: FROSTBURG STATE AND NORTHWESTERN	974
V.	WHO'S AN EMPLOYEE?	978
	<i>A. U.S. Law Provides Three Primary Definitions of Employee</i>	978
	1. The Common-Law Test Emphasizes Control.....	978
	2. The Economic-Realities Test Emphasizes the Worker's Economic Dependency on the Employer.....	984

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3. The Hybrid Test Examines the Totality of the Circumstances	985
B. <i>The Strange Case of the NLRA Definition of Employee</i>	986
C. <i>Northwestern's Football Players Are Statutory Employees Under the NLRA</i>	989
VI. POTENTIAL PROBLEMS WITH TREATING COLLEGE ATHLETES AS EMPLOYEES FOR PURPOSES OF COLLECTIVE BARGAINING	992
VII. CONCLUSION	995

I. INTRODUCTION

I entered Harvard College in 1983. I wanted to major in math and philosophy and to try out for the varsity swim team as a diver. As misfortune would have it, I was hit by a van while riding my bicycle a few weeks before school started. I was not severely injured—just a broken big toe—but it was serious enough for me to sit out my freshman year. During my sophomore year, months after my injury had healed, I tried out and made the team. I was a fair athlete, coming in third or fourth place in a dual meet, but I would not call myself a great or dedicated athlete. Our practices were Monday through Friday afternoons for about three hours. We also practiced on Tuesday and Thursday mornings for about 90 minutes starting at 6 or 7 AM. We were required to do some weight training as well. On Saturday, we coached local children. We were not paid, but any money we raised was put toward our annual winter training trip to Hawaii. I never attended those training sessions because the trip coincided with our winter break and it was one of the few times during the year that I could visit my parents and my siblings. As I understand it, the money that I helped raise went toward defraying trip-related costs for other swimmers and divers. On Sunday, we rested.

During my junior year, I was injured in practice performing a very simple dive: a front dive. I must have whiplashed my head as I entered the water, resulting in a sprained neck and some twisted vertebrae. My coach immediately sent me to the trainer, who was in a sports complex near Blodgett Pool. I recall seeing an ice hockey player icing his legs. The trainer asked me to describe what happened. After hearing my story, he put me in traction to stretch my neck and then in a neck brace. At 5'2" and 105 pounds, the brace, which was made with a male football player in mind, turned out to be much too large for me. So the trainer cut the foam and cloth brace and referred me to a University Health Services physical therapist who manipulated my spine and put me in traction once a week for the remainder of the school year. I was in pain for nine months before a chiropractor finally realigned my neck and back during the summer break. I decided not to compete in my senior year.

In my capacity as a diver for the Harvard Varsity Swim Team, I never thought of myself as an employee of Harvard, even when I was compelled to

volunteer my precious Saturday mornings (that is, my sleep) as a diving coach. I was proud to say that I was a student-athlete and proud to wear my crimson-colored swim parka around campus. But I was also confused. After all, if I were a student-athlete, why was I working out nearly 20 hours per week? I was also a college work-study student; part of my financial aid package included working for about 10 to 12 hours per week, sometimes more, and maintaining a B+ minimum average. I chose to work at Robbins Library of Philosophy so that I could get a little schoolwork done when things were quiet. I also took about 12 hours of class. Not counting sleeping (56 hours), dining in hall (17 hours), bathing (5 hours), walking to and from classes (5 hours), and walking to and from practices (4 hours), I was already occupied nearly 45 hours per week. Assuming no inefficiencies in going from one activity to another (a patently inaccurate assumption), this left me about 38 hours per week or an average of 5.5 hours per day to study and socialize. Because most of that time went into studying, I spent much of my dining time socializing with perhaps a few hours off on the weekends to attend a college ball game or weekend evenings to attend a dorm party or a movie. Of course, even those events were squeezed out during the meet season.

My 18- to 20-year-old self found it hard to balance the demands of college sport with the demands of college academics. I kept telling myself that college is for education and sport is for fun. I went to Harvard for an education; diving was a fun way to stay in shape. But the more we practiced, the less fun I was having.

Thirty years have passed since I last competed for Harvard. In those three decades, much has changed. Three changes are particularly relevant here. First, the National Collegiate Athletic Association ("NCAA") implemented Proposition 48, approved in 1983 and implemented in 1986, which required athletic recruits to earn an SAT score of 700 and a 2.0 GPA in 11 core high school courses to be sports eligible.¹ NCAA officials and others viewed this reform as needed to remedy unintended consequences of the NCAA's 1970s reforms, which had loosened academic standards for so-called student-athletes.² The 1970s changes resulted in significantly lower graduation rates for college athletes and in several scandals involving students paid to take exams for these athletes.³ The NCAA has since tinkered with academic standards, although they remain

¹ See Michael Oriard, *NCAA Academic Reform: History, Context and Challenges*, 5 J. INTERCOLLEGIATE SPORT 4, 13 (2012), http://www.americankinesiology.org/AcuCustom/Sitename/Documents/DocumentItem/02_oriard_JIS_0006_4-18.pdf.

² *Id.*

³ *Id.* at 12–13.

similar in kind to those of the 1980s.⁴ Second, the NCAA began drug testing its athletes in 1986.⁵ Third, in the 1984 decision of *NCAA v. Board of Regents of the University of Oklahoma*,⁶ the Supreme Court ruled that the NCAA's control over televised college football games constituted an unreasonable restraint of trade in violation of the Sherman Antitrust Act.⁷ This decision resulted in TV revenue sharing with universities, which in turn brought about more televised games, generating dramatically increased revenue for big football schools and significant realignment of conferences, with the best football programs (and profits) concentrated in what is known as the Power Five football conferences.⁸

This Paper reviews one controversy that arose in the context of these changes—the ever-increasing perception that college athletes, particularly college football players at Power Five schools, are exploited and what we as a society should do to protect these young men and women.

This Paper argues that exploitation of these students is possible, in part, because the exploiters rely on the persistence of the student-athlete myth. Accordingly, when football players at Northwestern University proposed a solution—to allow some of these athletes to unionize so that they could bargain for better “working” conditions and a cut of the profits created by increased commercialization—that solution was met with disbelief and confusion. After all, how can student-athletes, mere amateur athletes who are primarily seeking an education, bargain for working conditions? That view temporarily won the day in the *Northwestern* case.⁹

⁴ See generally Michael J. Mondello & Amy M. Abernethy, *An Historical Overview of Student-Athlete Academic Eligibility and the Future Implications of Cureton v. NCAA*, 7 VILL. SPORTS & ENT. L.J. 127 (2000).

⁵ See John A. Scanlan, Jr., *Playing the Drug-Testing Game: College Athletes, Regulatory Institutions, and the Structures of Constitutional Argument*, 62 IND. L.J. 863, 882–84 (1986); see also NCAA, DRUG TESTING PROGRAM 2016–2017, http://www.ncaa.org/sites/default/files/2016SSI_DrugTestingProgramBooklet_20160728.pdf.

This change is important because it shows the significant pressure placed on athletes to become increasingly better by using performance-enhancing drugs, even where the side effects of those drugs might eventually have health-deleterious effects on the athlete. This Paper does not delve into the significance of this relevant development.

⁶ 468 U.S. 85 (1984).

⁷ 15 U.S.C. § 1 (1890).

⁸ Oriard, *supra* note 1, at 14–15.

⁹ See *Northwestern Univ.*, 362 N.L.R.B. No. 167, 2015 WL 4882656, at *1 (Aug. 17, 2015) (refusing to assert jurisdiction over the case and therefore unable to reach the question whether scholarship football players are statutory employees under the National Labor Relations Act entitled to form a union). But see OFFICE OF THE GEN. COUNSEL, NAT'L LABOR RELATIONS BD., MEMORANDUM GC 17-01, at 23 (Jan. 31, 2017), <https://www.nlrb.gov/reports-guidance/general-counsel-memos> (follow “Report on the Statutory Rights of University” hyperlink) (determining that “the application of the statutory definition of employee and the common-law test lead to the conclusion that Division I FBS scholarship football players are employees under the NLRA, and

To understand the nuances of this controversy, it is important to understand its context—a context whose pieces, when put together, present a case for structural exploitation. The pieces to this puzzle are collated in Parts II to IV of this Paper. Part II briefly defines the concept of exploitation, distinguishes between two types of exploitation (transactional and structural), and posits that, while there may be some transactional exploitation in dealings between college football players and their schools, this situation poses the problems associated with structural exploitation.

Part III describes an important part of the sociological context in which this story is unfolding; the current view that these young athletes are groomed for exploitation as high school students and then further exploited as college athletes. It briefly reviews six aspects of that exploitation: (1) the sport is brutal; (2) there is a low financial payoff for a sport so high in health and safety risks; (3) college football has been commercialized for some time with Power Five universities and the NCAA having much at stake; (4) the student-athlete ideal is a myth perpetuated by those who have a financial stake; (5) Power Five universities hold monopsony power; and (6) thus far, lawmakers have been unwilling to recognize this vulnerability, thereby exacerbating the exploitation.

Part IV positions this discussion in the context of two recent news stories. First, the case of the Frostburg State football player who died in practice because of a concussion that his coach allegedly ignored. Second, the *Northwestern* case, in which the football players attempted to form a union. By placing this controversy within the context of two specific cases, one which represents the brutality of the sport and the other which represents players' unsuccessful attempt at self-help, the reader should gain insights into the horrific exploitation of our young people all in the name of commercialization.

Part V answers the question on which the National Labor Relations Board (“NLRB” or “the Board”) punted¹⁰—are Northwestern football players employees for purposes of collective bargaining and mutual aid or protection (or indeed for purposes of other labor statutes)? The answer is a resounding yes, although that answer is not what is interesting about that question.

The final section, Part VI, discusses the problem of cognitive dissidence between the legal answer—yes, college athletes often meet the definition of employees—and our intuition that college athletes should not be employees of the very university that allegedly has an interest in educating that young person.

that they therefore have the right to be protected from retaliation when they engage in concerted activities for mutual aid and protection”).

¹⁰ Anne Marie Lofaso, *United States Labor Relations Board Cowardly Punts Its Duties*, OXHRH BLOG (Aug. 31, 2015), <http://ohrh.law.ox.ac.uk/united-states-labor-relations-board-cowardly-punts-its-duties/>.

II. WHAT IS EXPLOITATION?

Exploitation is the key concept in understanding the student-athlete's dilemma. It is not, however, a simple concept to deconstruct. This short section gives a brief introduction to this concept, sufficient for the reader to understand the issues at stake.

Thinkers writing in the socio-legal tradition have presented many definitions of exploitation. This section starts with Karl Marx's thinking on the subject because labor scholars build on, or draw inspiration from, his work even when critical of it. Marx famously defined exploitation in the context of a capitalist society as the taking of surplus value. Marx claims:

$$C = c + v$$

Here, capital (C) consists of the sum of the amount of money expended on the means of production (c), a constant, and labor power (v), a variable that is paid out as wages,¹¹ where labor power is the "productive expenditure of human brains, nerves, and muscles."¹² According to Marx, the production process produces a commodity, "an object outside us . . . that by its properties satisfies human wants."¹³ The value of that commodity is $c + v + s$, where s signifies surplus value¹⁴:

$$C' = c + v + s$$

In Marx's view, labor has transformed the original capital, C, into C'. That surplus value, s, is purely the result of labor power.¹⁵ Marx coupled his labor theory of value—labor and only labor creates value—with his labor theory of surplus value—workers receive the value of their labor power typically in the form of wages; the value of the commodity produced is greater than the value of the wages earned; therefore, the worker receives less than he or she creates—to show that workers are exploited by capitalists who are receiving the difference between the commodity's value and the wages paid to their workers.¹⁶

Philosopher Gerry Cohen and others have partially discredited this theory, showing that Marx's labor theory of surplus value is both unnecessary to proving his moral claim that capitalism exploits workers and, in any event,

¹¹ 1 KARL MARX, CAPITAL 150 (Dave Allinson ed., Samuel Moore & Edward Aveling trans., 2015) (1887), <https://www.marxists.org/archive/marx/works/download/pdf/Capital-Volume-I.pdf>; see G. A. Cohen, *The Labor Theory of Value and the Concept of Exploitation*, 8 PHIL. & PUB. AFF. 338, 341 (1979).

¹² 1 MARX, *supra* note 11, at 32.

¹³ *Id.* at 27.

¹⁴ *Id.* at 150.

¹⁵ *Id.* at 151.

¹⁶ See Cohen, *supra* note 11, at 342.

false.¹⁷ According to Cohen, a theory of exploitation is not dependent on the labor theory of surplus value because Marx’s labor theory of surplus value can be simplified into the following truism: “The capitalist receives some of the value of the product.”¹⁸ The following chart shows Cohen’s argument:

*Comparing Marx’s Argument that Capitalists Exploit Workers with the Simplified Argument that Does Not Rely on the Labor Theory of Surplus*¹⁹

<i>Marx’s Theory</i>	<i>Simplification</i>
Marx’s Labor Theory of Value: Labor and labor alone creates value.	Labor and labor alone creates value.
Marx’s Labor Theory of Surplus Value: (a) The laborer receives the value of his labor power.	<i>Cohen’s Truism:</i> The capitalist receives some of the value of the product.
(b) The value of the product is greater than the value of his labor power.	
(c) Therefore, the laborer receives less value than he creates.	Therefore, the laborer receives less value than he creates, and
The capitalist receives the remaining value.	The capitalist receives some of the value the laborer creates.
Therefore, the laborer is exploited by the capitalist.	Therefore, the laborer is exploited by the capitalist.

Whether or not Cohen is correct, Marx’s intuition, that capitalism exploits, is significant.²⁰ (Even Cohen agrees with this latter point.)²¹ Accordingly, several modern thinkers have worked to develop a theory, or at least a definition, of exploitation within the work context. For example, political theorist Alan Wertheimer defines exploitation as the morally wrongful use of a person to gain advantage.²² Robert Goodin writes that exploitation is the flagrant violation of the “special responsibilities to protect those who are particularly vulnerable to our actions and choices.”²³ Goodin further explains that

¹⁷ *Id.* But see Nancy Holstrom, *Marx and Cohen on Exploitation and the Labor Theory of Value*, 26 INQUIRY 287 (1983) (arguing that Cohen is wrong and that Marx withstands his criticisms). For a list of economists who have the same critique as Cohen, see *id.* at 287 n.3, 303.

¹⁸ Cohen, *supra* note 11, at 344.

¹⁹ This chart uses Cohen’s language verbatim. See *id.* at 342–44.

²⁰ See generally KARL MARX, DAS KAPITAL (1867).

²¹ Cohen, *supra* note 11, at 344.

²² See ALAN WERTHEIMER, EXPLOITATION 10–12 (1996).

²³ ROBERT E. GOODIN, REASONS FOR WELFARE: THE POLITICAL THEORY FOR THE WELFARE STATE 367 (1988).

[t]here are four [necessary] conditions. . . . First, the relationship must be *asymmetrical*. . . . Second, . . . the subordinate party must *need* the resource that the superordinate supplies. . . . Third, . . . the subordinate party must depend upon some *particular* superordinate for the supply of needed resources. . . . Fourth, the superordinate . . . enjoys *discretionary* control over the resources that the subordinate needs from him.²⁴

Goodin's definition and his four-factored analysis focus on relationships with power asymmetry, which might include parent-children, man-woman/majority-minority, teacher-student, or employer-employee.²⁵ There must also be a vulnerability, which Goodin characterizes as a "needed resource[]." ²⁶ Here, the needed resource is the opportunity to play college football. Under Goodin's conditions, the University and the NCAA have duties to the college football player, who is in a vulnerable relationship with both institutions.

For our purposes, the important insight comes in seeing a distinction between transactional and structural exploitation. Transactional exploitation focuses on the moral unfairness of particular transactions, whereas structural exploitation focuses on institutions within a particular culture, which when taken together enable exploitation.²⁷ The main characteristics of transactional exploitation are: (1) an interaction between the exploiter and the victim; (2) the exploiter receives a benefit from the victim; (3) the exploiter advances his or her self-interest or non-self-interested goal; and (4) harm to the victim relative to his or her position without the transaction or the victim experiences the transaction as degrading, humiliating, or unfair.²⁸ The voluntariness of the transaction is not a characteristic of transactional exploitation.²⁹

Structural exploitation tends to occur in competitive markets due to "the presence of dependent third parties who are exploitable," including, for example, employees.³⁰

In the face of competitive pressure from rivals, an enterprise takes unfair advantage of its dependents, gaining at their expense. The exploiter does so to gain a competitive advantage against rivals, or to level the playing field with rivals who also exploit, or perhaps to avoid falling further behind in the struggle

²⁴ Robert E. Goodin, *Reasons for Welfare: Economic, Sociological, and Political—But Ultimately Moral*, in *RESPONSIBILITY, RIGHTS, AND WELFARE* 37 (Donald J. Moon ed., 1988).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Matt Zwolinski, *Structural Exploitation*, 29 *SOC. PHIL. & POL'Y* 154, 158–61 (2012).

²⁸ *Id.* at 156.

²⁹ *Id.*

³⁰ Robert Mayer, *Sweatshops, Exploitation, and Moral Responsibility*, 38 *J. SOC. PHIL.* 605, 612 (2007).

with rivals who have pulled ahead. In competitive settings where structural exploitation occurs, the possibility of failure is real, even for large and powerful enterprises. If they cannot compete, they stand to suffer a sizable—even catastrophic—loss.³¹

In the context of college football, the exploiters would include NCAA officials, university officials, and the coaches. Amidst intense competition, coaches recruit the best high school players in the United States. These students have no other choice if they wish to play professional football. Under National Football League (“NFL”) rules, they are not permitted to play professional ball for at least the next three years.³² And there is no such thing as minor league football. The Power Five universities together act as a monopsony.³³ Within this exploitative structure, universities may or may not act in a manner that is morally reprehensible. For example, it may very well be that if a university used football-player likenesses to profit from video games that they engaged in an exploitative transaction. My concern here is not, however, with this type of exploitation, but instead with the structures and institutions that create conditions ripe for exploitation.

III. THE EXPLOITATION OF YOUNG ATHLETES: A SNAPSHOT OF THE BRUTALITY AND COMMERCIALIZATION OF HIGH SCHOOL AND COLLEGE FOOTBALL

This part focuses on two important structures that facilitate the exploitation of youth football players in the United States. First, American football is a dangerous sport that is not sufficiently regulated to protect the health and safety of young American football players. American football players are taking these health risks with nearly no prospect for long-term financial gain. These points are developed in Section III.A. Second, the most elite college football teams have significant financial stakes in the game. Rather than admitting that, at the very least, their interest in educating these students and protecting these athletes’ conflicts, to some extent, with their business interests, these universities and the NCAA perpetuate the myth of the amateur student-athlete. This myth makes it structurally difficult for judges and lay people to view these young athletes for what they are—professional football players. Compounding this problem, college football is the only outlet for young men who want to play professional ball because NFL rules prohibit young football players from applying for a job as a professional football player until the third year after their high school class graduates. These points are developed in Section

³¹ *Id.*

³² See *infra* note 92 and accompanying text.

³³ See generally ALAN MANNING, MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS 4–7 (2003).

III.B. Part IV puts these points in the context of two stories. Finally, the law itself facilitates this exploitation, first by failing to sufficiently regulate health and safety, and second by refusing to look at the economic and social realities of these student-athletes. Part V develops these final points.

A. American Football Player Side: A Dangerous Sport with Negligible Prospects for Future Earnings

There is only one sport that regularly kills children. “That sport is American football.”³⁴

Winnsboro, Louisiana. September 2, 2015. Tyrell Cameron, a “humble” 16-year-old junior with “overwhelming potential,” broke his neck during a punt return in the fourth quarter.³⁵ He never moved again.³⁶ He died later that night.³⁷

Bartlesville, Oklahoma. September 11, 2015. Ben Hamm, a 16-year-old junior linebacker who served as both the captain and spiritual leader of his high school football team, suffered a head injury during a tackle in the fourth quarter.³⁸ He was taken by ambulance to a local hospital where doctors performed two head surgeries and put him in a medically induced coma to relieve pressure on his brain.³⁹ He died eight days later from lack of oxygen to the brain.⁴⁰

Washington, New Jersey. September 25, 2015. Evan Murray, 17 years old, gifted three-sport student-athlete, and starting quarterback for his high school football team, “felt ‘woozy’” after a tackle.⁴¹ Although he walked off the field, he collapsed on the sidelines.⁴² He died later that night in the hospital due to massive internal bleeding caused by a cut on his spleen.⁴³

³⁴ Charles P. Pierce, *The Death of Evan Murray*, GRANTLAND (Sept. 30, 2015), <http://grantland.com/the-triangle/the-death-of-evan-murray/>. See generally Kaylyn Kahler & Dan Greene, *The Game’s Tragic Toll*, OPEN FIELD (Nov. 24, 2015), <http://mmqb.si.com/mmqb/2015/11/24/high-school-football-deaths-2015>.

³⁵ *Police: Louisiana Prep Football Player Dies After Being Injured on Punt Return*, USATODAY (Sept. 4, 2015), <http://usatodayhss.com/2015/franklin-parish-tyrell-cameron-player-dies>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Wills Robinson, *Talented Football Player at Private Christian High School Dies a Week After Making a Routine Tackle*, DAILY MAIL (Sept. 22, 2015), <http://www.dailymail.co.uk/news/article-3244839/Talented-football-player-private-Christian-high-school-dies-week-making-routine-tackle.html>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Pierce, *supra* note 34.

⁴² *Id.*

⁴³ *Id.*; Patricia Didelot, *Evan Murray Cause of Death: Coroner Reveals What Killed High School Football Player*, INQUISITR (Sept. 29, 2015), <http://www.inquisitr.com/2457118/evan-murray-cause-of-death-coroner-reveals-what-killed-high-school-football-player/>.

Seattle, Washington. October 2, 2015. During the fourth quarter of Evergreen High School's homecoming game, a 17-year-old football star, Kenny Bui, took a hard hit and walked off the field dazed.⁴⁴ A few moments later he closed his eyes and never awakened.⁴⁵ The straight-A student died a few days later of traumatic brain injury.⁴⁶

These are just 4 of 11 high school football-related deaths during the 2015 season.⁴⁷ According to the latest study, which reviewed data on high school and college football fatalities between July 1990 and June 2010, "there were 243 football fatalities (1.0 per 100,000 participants), all in male athletes (average, 12.2 annually): 203 (average, 10.2 annually; 0.9 per 100,000 participants) in high school players and 40 (average, 2.0 annually; 2.5 per 100,000 participants) in college players."⁴⁸

Notwithstanding these grim figures (or maybe because of them), football remains the most popular participation sport for boys and young men in the United States. Over one million American boys play high school football.⁴⁹ Of those, only 6.7%, nearly 73,000, play college football.⁵⁰ The NFL drafts only 256 young men per year to become professional football players.⁵¹ That means that only 1.6% of all college football players and only 0.023% of high school football players ever succeed in becoming professional football players.⁵²

For 16 years between 1988 and 2004, the NCAA Injury Surveillance System ("ISS") collected injury and exposure data for nine men's sports: baseball, basketball, fall and spring football, gymnastics, ice hockey, lacrosse, soccer, and wrestling; and eight women's sports: basketball, field hockey,

⁴⁴ Paul Farrell, *Kenny Bui Dies: 5 Fast Facts You Need to Know*, HEAVY (Oct. 5, 2015, 4:40 PM), <http://heavy.com/sports/2015/10/kenny-bui-dead-dies-cause-of-death-rip-buistrong-funeral/>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See generally Kahler & Greene, *supra* note 34.

⁴⁸ See Barry P. Boden et al., *Fatalities in High School and College Football Players*, 41 AM. J. SPORTS MED. 1108, 1109 (2013).

⁴⁹ Football, NCAA, <http://www.ncaa.org/about/resources/research/football> (last updated Mar. 10, 2017).

⁵⁰ *Id.*; see *Estimated Probability of Competing in College Athletics*, NCAA, <http://www.ncaa.org/about/resources/research/estimated-probability-competing-college-athletics> (last updated Mar. 10, 2017).

⁵¹ Football, *supra* note 49; see *Estimated Probability of Competing in Professional Athletics*, NCAA <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> (last updated Mar. 10, 2017).

⁵² Football, *supra* note 49; see *Estimated Probability of Competing in Professional Athletics*, *supra* note 51.

gymnastics, ice hockey, lacrosse, soccer, softball, and volleyball.⁵³ Not surprisingly, this study showed that, although all of these sports contained some risks, football had the highest injury rates for both practices (9.6 injuries per 1000 A-Es [athlete exposures]) and games (35.9 injuries per 1000 A-Es).⁵⁴

Another significant feature of football is the high association of concussions with the game and the correlation between multiple concussions and later health problems. A concussion is simply the rapid movement of the brain hitting up against the skull, typically resulting from a blow to the head.⁵⁵ High-school age and even young-adult athletes are more vulnerable to the neurological effects of concussions than are adult players, in part because their brains are not fully developed until they are 25 years old.⁵⁶ According to the Sports Concussion Institute:

Recent research demonstrates that high school athletes not only take longer to recover after a concussion when compared to collegiate or professional athletes, but they also may experience greater severity of symptoms and more neurological disturbances as measured by neuropsychological and postural stability tests. It is also estimated that 53% of high school athletes have sustained a concussion before participation in high school sports, and 36% of collegiate athletes have a history of multiple concussions. Because the frontal lobes of the human brain continue to develop until age 25, it is vital to manage youth concussions very conservatively to ensure optimal neurological development and outcomes.⁵⁷

Concussions are commonplace in football with compounding effects. According to research reported by the Sports Concussion Institute, those who have received one concussion are “[one to two] times more likely to receive a second one.”⁵⁸ After two concussions, “a third is two to four times more likely, and after three concussions, a fourth is three to nine times more likely.”⁵⁹ A

⁵³ J.M. Hootman et al., *Epidemiology of Collegiate Injuries for 15 Sports: Summary and Recommendations for Injury Prevention Initiatives*, 42 J. ATHLETIC TRAINING 311, 318 (2007). Although data was collected for these 17 sports, information on men’s gymnastics was not reported because of the small sample size. Moreover, data on women’s ice hockey was collected starting in 2000, after the study had commenced.

⁵⁴ *Id.* at 311. A-E stands for athlete exposure and “was defined as 1 athlete participating in 1 practice or game and is expressed as an athlete-exposure (A-E).” *Id.*

⁵⁵ *Concussion Facts*, SPORTS CONCUSSION INST., <http://www.concussiontreatment.com/concussionfacts.html> (last visited Mar. 22, 2017).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

medical history of multiple concussions can result in the development of mild cognitive impairments, chronic traumatic encephalopathy, and post-concussion syndrome, among other things.⁶⁰ A better understanding of chronic traumatic encephalopathy, “a progressive degenerative disease of the brain found in athletes (and others) with a history of repetitive brain trauma, including symptomatic concussions as well as asymptomatic subconcussive hits to the head,” has in particular bolstered the view that the long term effects of multiple concussions is devastating for the athlete’s long-term health.⁶¹

B. College Football’s Business Side: The Arms Race

The NCAA represents itself as the protector of amateur sports competition and the guardian of the student-athlete.⁶² The NCAA considers amateur competition to be “a bedrock principle of college athletics” and “crucial to preserving an academic environment in which acquiring a quality education is the first priority.”⁶³ To highlight the primacy of academics over athletics, the NCAA further explains that “[i]n the collegiate model of sports, the young men and women competing on the field or court are students first, athletes second.”⁶⁴

History belies these representations, showing instead that football’s commercialization is a systemic problem in search of transformative solutions. The commercialization of college football is rooted in the hallowed halls of Yale

⁶⁰ *Id.*

⁶¹ According to the Boston University CTE Center:

[R]ecent reports have been published of neuropathologically confirmed CTE in retired professional football players and other athletes who have a history of repetitive brain trauma. This trauma triggers progressive degeneration of the brain tissue, including the build-up of an abnormal protein called tau. These changes in the brain can begin months, years, or even decades after the last brain trauma or end of active athletic involvement. The brain degeneration is associated with memory loss, confusion, impaired judgment, impulse control problems, aggression, depression, and, eventually, progressive dementia.

What is CTE?, BU CTE CENTER, <http://www.bu.edu/cte/about/what-is-cte/> (last visited Mar. 22, 2017). See generally Julian E. Bailes et al., *Role of Subconcussion in Repetitive Mild Traumatic Brain Injury: A Review*, 119 J. NEUROSURGERY 1235–45 (Nov. 2013). See also Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy (CTE) in a National Football League Player: Case Report and Emerging Medicolegal Practice Questions*, 6 J. FORENSIC NURSING 40–46 (2010); Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player: Part II*, 59 NEUROSURGERY 1086–93 (Nov. 2006), <http://www.protectthebrain.org/documents/CTE-Part-II-Neurosurgery-2006.pdf>; Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 NEUROSURGERY 128–34 (July 2005), <http://m.protectthebrain.org/documents/CTE-Part-I-Neurosurgery.pdf>.

⁶² *Amateurism*, NCAA, <http://www.ncaa.org/amateurism> (last visited Mar. 22, 2017).

⁶³ *Id.*

⁶⁴ *Id.*

University.⁶⁵ A star athlete at Yale during the late nineteenth century could expect the following:

- (1) a suite of rooms in the dorm; (2) free meals at the University club; (3) a one-hundred-dollar scholarship; (4) the profits from the sale of programs; (5) an agency arrangement with the American Tobacco Company, under which he received a commission on cigarettes sold in New Haven; and (6) a ten-day paid vacation to Cuba.⁶⁶

According to one uncontroversial study, sociologists traced college football's commercialization and functional rationalization to Yale's nouveau riche industrial ruling class, which gained control of Yale's governing board and injected into football's organizational structure principles of industrialization, such as functional specialization, which permeate the college football business model to this day.⁶⁷ For example, Yale coaches specialized, coordinated training, and strategized through daily meetings.⁶⁸ Yale coaches also collected and maintained accurate data and reviewed those data in creating game strategies.⁶⁹ Harvard, by contrast, engaged in none of these modern techniques devised by Yale.⁷⁰ As a result, between 1875 and 1907, Yale defeated Harvard in all but three games, made more money than Harvard (sometimes by a factor of two to one), and produced three times as many professional football coaches.⁷¹

By 1905, numerous universities either banned or considered banning the sport because of its brutality and commercialization.⁷² Columbia, the largest university at that time, together with several other colleges, banned the sport, while Harvard, the second largest university, nearly banned the sport.⁷³ The crisis began in Columbia in 1899 when the football manager paid scholarships to five student players out of university funds.⁷⁴ The following year, the team defaulted on a contract to rent a playing field, which led university officials to threaten to

⁶⁵ David L. Wesby & Allan Sack, *The Commercialization and Functional Rationalization of College Football*, 47 J. HIGHER EDUC. 625 (1976).

⁶⁶ Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 11 n.7 (2000).

⁶⁷ Wesby & Sack, *supra* note 65, at 632–42.

⁶⁸ *Id.* at 628.

⁶⁹ *Id.* at 628–29.

⁷⁰ *Id.*

⁷¹ *Id.* at 628–32.

⁷² Ronald A. Smith, *Harvard and Columbia and a Reconsideration of the 1905–06 Football Crisis*, 8 J. SPORT HIST., no. 3, 1981, at 5, 6, <http://library.la84.org/SportsLibrary/JSH/JSH1981/JSH0803/jsh0803b.pdf>.

⁷³ *Id.*

⁷⁴ *Id.*

ban the sport unless it could sustain itself.⁷⁵ The 1905–1906 controversy ultimately resulted in the creation of the NCAA.⁷⁶

These two critiques of the game have persisted to this day: the sport is excessively violent and although it represents itself as an “‘educational enterprise’ . . . [its] thoroughgoing commercialization [is] inconsistent with received academic values.”⁷⁷ The violence is not limited to on-the-field fatalities and life-threatening or life-shortening injuries, but also includes a culture that seems to encourage violence. One sports news blog recently reported on the top 12 NFL player gun-related deaths since 2006.⁷⁸ One recent economic study reported a strong link between football and rape.⁷⁹ The study, which reviewed rape reports of campus and local law enforcement agencies associated with Division IA schools, detailed that incidents of reported rapes spiked 41% on home-game days, 15% on away-game days, and 57% on days of an underdog home-team upset.⁸⁰ The study hypothesizes that these rapes are likely caused by increased alcohol consumption, which fosters aggression resulting in an additional 253 to 770 additional rapes at these college campuses per year.⁸¹ Another website maintains a list and description of legal cases involving sexual assaults by college football players, which goes back to the 1970s.⁸²

The business side of college football recounts a mixed tale of ever-increasing revenues and expenditures with big winners, such as Texas, and many losers who continue to run a deficit.⁸³ This tale, infamously termed the college

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Vinnie Iyer, *Guns and the NFL: Players Shot Since 2006*, SPORTING NEWS (June 6, 2016), <http://www.sportingnews.com/nfl/list/nfl-players-shot-guns-aqib-talib-will-smith-sean-taylor-plaxico-burress/mltyh8vnrk8a15eja7ku6xaf0>.

⁷⁹ Danielle Paquette, *The Disturbing Truth About College Football and Rape*, WASH. POST (Dec. 29, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/12/29/the-disturbing-truth-about-college-football-and-rape/?utm_term=.ae6639355362 (reporting on a study conducted by Texas A&M professor of economics, Jason Lindo, and published in December 2015).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Jessica W. Luther, *A List of College Football Sexual Assault Investigations and Cases*, JESSICA W. LUTHER BLOG (Oct. 30, 2016), <http://jessicawluther.com/thelist/>.

⁸³ Will Hobson & Steven Rich, *Playing in the Red*, WASH. POST (Nov. 23, 2015), <http://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills/>. See generally David C. Hardesty, Jr., *The Value and Perils of Intercollegiate Athletics: A Presidential Perspective*, in LEADING THE PUBLIC UNIVERSITY: ESSAYS, SPEECHES, AND COMMENTARY 199–207 (2007), reprinted in REVERSING FIELD: EXAMINING COMMERCIALIZATION, LABOR, GENDER, AND RACE IN 21ST-CENTURY SPORTS LAW 28–33 (andré douglas pond cummings & Anne Marie Lofaso eds., 2010) (hereinafter REVERSING FIELD).

arms race,⁸⁴ starts with the 128 members of the NCAA Division I Football Bowl Subdivision (“FBS”), the highest level of collegiate football. Based on a survey of 48 of those 128 teams,⁸⁵ *The Washington Post* reported that 25 or 51.9% were running a deficit in 2014.⁸⁶ *The Washington Post* further reported that, between 2004 and 2014, “the combined income of . . . 48 [surveyed FBS] departments nearly doubled, from \$2.67 billion to \$4.49 billion.”⁸⁷ Indeed, according to the NCAA, only 24 FBS schools generated a profit in 2014.⁸⁸ “Athletic directors at money-losing departments defend their spending as essential to keeping pace with competition. Their programs benefit universities in ways that don’t show on athletics financial statements, they said, like media exposure that can cause increased applicants and help fundraising.”⁸⁹

University revenue is just part of the story. In 2015, a district court judge approved a \$60 million settlement in a lawsuit against the NCAA, the Collegiate Licensing Company, and video-game manufacturer, Electronic Arts, for using the images, likenesses, and names of more than 20,000 current and former college football players in video games to generate profits.⁹⁰ The players initially received no money because NCAA rules forbid student-athletes from receiving pay for play.⁹¹

⁸⁴ For an in-depth analysis of the college sports arms race, see Alfred Dennis Mathewson, *Exploring the Commercialized Arms Race Metaphor*, in *REVERSING FIELD*, *supra* note 83, at 34–45.

⁸⁵ All of the teams examined belonged to the Power Five, the NCAA Division I FBS’s wealthiest five conferences, which is comprised of 65 teams. *Id.* Those conference are: ACC (15 teams, 14 teams plus independent team Notre Dame), Big 12 (10 teams), Big 10 (14 teams), Pac 12 (12 teams), and SEC (14 teams). See *NCAA College Football*, ASSOCIATED PRESS, <http://collegefootball.ap.org/conferences> (last visited Feb. 17, 2017).

⁸⁶ Hobson & Rich, *supra* note 83. This figure is down from 60.4% in 2004 (based on a survey of 48 teams). *Id.*

⁸⁷ *Id.*

⁸⁸ Brian Burnsed, *Athletic Departments that Make More Than They Spend Still a Minority*, NCAA (Sept. 18, 2015, 9:30 AM), <http://www.ncaa.org/about/resources/media-center/news/athletics-departments-make-more-they-spend-still-minority>; see DANIEL L. FULKS, REVENUES AND EXPENSES 2004–2014: NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 8, 13 (2015), <http://www.ncaa.org/sites/default/files/2015%20Division%20I%20RE%20report.pdf>.

⁸⁹ Hobson & Rich, *supra* note 83. For the NCAA’s perspective on this question, see Bernard Franklin, *More Lightning and Less Thunder*, in *REVERSING FIELD*, *supra* note 83, at 16–27.

⁹⁰ Jon Solomon, *Judge Approves NCAA Video Game Settlements to Pay Players*, CBS SPORTS (July 16, 2015), <http://www.cbssports.com/college-football/news/judge-approves-ncaa-video-game-settlements-to-pay-players/>.

⁹¹ Jim Kleinpeter, *College Football Players Used in EA’s NCAA Video Games to Get About \$1,200, Report Says*, NOLA MEDIA GROUP (Mar. 15, 2016, 12:42 PM), http://www.nola.com/lsu/index.ssf/2016/03/college_football_players_used.html.

It is noteworthy that college football serves as the American football minor league. This is enabled most prominently by the NFL new player eligibility rule, which prohibits a team from:

[S]ign[ing] a player to an NFL Player Contract . . . or select[ing] a player in a Draft . . . until such player meets one of the following requirements:

COLLEGE ELIGIBILITY. All college football eligibility of such player has expired through participation in college football (expiration does not include a loss of college football eligibility through withdrawal from school, dismissal, or signing of a professional contract in another football league). Or,

GRADUATION. Such player has graduated and received a diploma from a recognized college or university prior to the beginning of the . . . League's next regular season . . . Or, . . .

FIVE-YEAR RULE. Five League seasons have elapsed since such player first entered, attended, practiced football at, or participated in football games for a recognized junior college, college, or university Special consideration is granted to those players whose college and/or conference allow five years of football eligibility, during all of which a player may participate full-time, as distinguished from those who "red-shirt," i.e., do not participate during one particular year. If a player under such circumstances has completed four years of participating football eligibility and elects not to avail himself of the fifth year, such player is eligible for selection in the League. Or,

NON-FOOTBALL COLLEGIANS. Such player did not play or otherwise participate in college football, and four League seasons have elapsed since the player first entered or attended college. Or,

PLAYER NOT ATTENDING COLLEGE. Any player who does not attend college is automatically eligible for selection in the next principal Draft that is conducted after four NFL regular seasons have begun and ended following either his graduation from high school or graduation of the class with which he entered high school, whichever is earlier. If four football seasons have not elapsed, he is ineligible for selection, but may apply to the Commissioner for Special Eligibility Or,

SPECIAL ELIGIBILITY. Such player has been granted eligibility through special permission of the Commissioner⁹²

⁹² *Eligibility Rules, NAT'L FOOTBALL LEAGUE*, <https://www.nflregionalcombines.com/Docs/Eligibility%20Rules.pdf> (last visited Mar. 22, 2017).

These rules essentially prevent young football players from entering the professional football market for at least three years after high school—or when they are at least 21 years old. For purposes of structural exploitation, the motive behind this rule is irrelevant. It may very well be that young athletes are not permitted to play professional ball for several years because their bodies are not physically able to play with those mature men who play professional ball. These eligibility rules nevertheless set up a market with the Power Five universities wielding monopsony power over the student-athletes.

IV. TWO CATALYST CASES: FROSTBURG STATE AND NORTHWESTERN

There are many ways to legally protect workers from their employers' arbitrary rules, but two of the most common means are regulation and bargaining. The wrongful-death suit of former Frostburg State football player Derek Sheely presents the case for regulation; Northwestern football players' attempt to organize presents the case for bargaining.

In August 2011, 22-year-old Derek Sheely was a fullback for Frostburg State's football team.⁹³ During practice, Derek suffered yet another concussion⁹⁴ while performing a variation of the "Oklahoma drill"—two players running full force at each other until one ends up on the ground and the other ends up victorious.⁹⁵ Think jousting.⁹⁶ According to news reports, "it was the fourth time in three days that a wound on Sheely's head had re-opened."⁹⁷ Sheely also reportedly told his coach that he had a headache.⁹⁸ The coach allegedly responded: "'Stop your bitching and moaning, and quit acting like a pussy and get back out there, Sheely!'" Sheely collapsed a few minutes later, and died within the week.⁹⁹

⁹³ Maryclaire Dale, *NCAA Among Defendants in Concussion-Related Lawsuit*, USATODAY (Aug. 27, 2013, 11:36 AM), <http://www.usatoday.com/story/sports/ncaaf/2013/08/27/frostburg-state-derek-sheely-ncaa-concussion-lawsuit/2706347/>.

⁹⁴ *Id.*

⁹⁵ David Fleming, *Is the Oklahoma Drill Just a Rite of Passage or Everything to Fear About Football?*, ESPN (Aug. 19, 2015), http://espn.go.com/college-football/story/_/id/13348894/is-oklahoma-drill-just-rite-passage-everything-fear-football.

⁹⁶ *Id.*

⁹⁷ Dan Diamond, *A Head Injury in Practice Killed Derek Sheely. Is the NCAA to Blame?*, FORBES: PHARMA & HEALTHCARE (Sept. 2, 2013, 7:47 AM), <http://www.forbes.com/sites/dandiamond/2013/09/02/a-head-injury-in-practice-killed-derek-sheely-is-the-ncaa-to-blame/#15b4c82e7675>.

⁹⁸ *Id.*

⁹⁹ *Id.*

The family sued the NCAA, the helmet manufacturer, and Frostburg State coaches for wrongful death.¹⁰⁰ The news reported that, according to court papers, although the NCAA “admits that it was ‘founded to protect young people from the dangerous and exploitative athletic practices of the time,’” it “denies that it has a legal duty to protect student-athletes.”¹⁰¹

Sheely’s wrongful death lawsuit presents a classic case in the tort versus regulation debate. A wrongful death suit is a suit in tort. Tort law serves many purposes—(1) moral justice,¹⁰² (2) social welfare, (3) compensation, (4) deterrence, and (5) civil peace. In particular, tort law (1) condemns the conduct of the tortfeasor; (2) spreads risk onto those who are best able to bear that risk; (3) compensates victims for the harm they have suffered at the hands of the tortfeasor’s intentional or negligent conduct; (4) reduces accidents by providing disincentives for unsafe conduct; and (5) eliminates the likelihood of self-help or revenge.¹⁰³ In the United States, these goals play out in a liberal democracy and capitalist economy, whose citizen-actors value personal autonomy and a free market that promotes economic growth. Accordingly, tort law will also tend to favor rules that promote individual liberty and serve (or at least do not undercut) capitalist goals.

Statutes and regulations can share the same goals as the common law of tort. The question thus becomes, when should policy makers step in to ensure which of these goals are served, who should bear the burden of serving those goals, and whether statutory/regulatory law should preempt or complement tort law? Yale Law Professor Susan Rose-Ackerman has argued that

[i]deally, tort law and regulatory standards work together to further deterrence and compensation goals. Torts and regulations can be complementary: 1) when tort doctrines are stopgaps which apply absent more stringent statutes; 2) when regulatory standards are intended as minima which more stringent tort doctrines can supplement, and 3) when a regulatory standard is set at the socially optimal level and tort

¹⁰⁰ Mike Singer, *NCAA “Denies Legal Duty” to Protect Student-Athletes, Court Filing Says*, CBS SPORTS (Dec. 19, 2013), <http://www.cbssports.com/general/news/ncaa-denies-legal-duty-to-protect-student-athletes-court-filing-says/>.

¹⁰¹ *Id.*

¹⁰² See Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184, 186 (1987) (explaining that tort “[l]iability redressed the moral disequilibrium caused by the defendant”).

¹⁰³ See Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975).

doctrine imposes either strict liability or a standard of care lower than that required by the agency.¹⁰⁴

With respect to the health and safety of student-athletes, Rose-Ackerman's first circumstance is true: regulation is absent. Accordingly, courts should "see tort law as a stopgap pending future statutory regulation" and "[t]he common law standard of [reasonableness] . . . can at least serve the needs of our society until the legislature imposes higher standards."¹⁰⁵ Rose-Ackerman adds that once "a regulatory statute is then passed, courts should resolve conflicts between tort doctrines and regulatory principles by according priority to the statute."¹⁰⁶

Northwestern University is a private, non-profit teaching institution, which has a Division IA football team in the Big Ten Conference, one of the Power Five conferences.¹⁰⁷ That team has 112 players, 85 of whom receive \$61,000 annual scholarships.¹⁰⁸ The NCAA allows both annual and multi-year scholarships.¹⁰⁹ Northwestern utilizes four- to five-year scholarships.¹¹⁰ These scholarship players must live on campus for two years and receive a meal plan.¹¹¹ After two years, scholarship athletes may live off campus and receive a monthly stipend of \$1200–1600 to cover expenses.¹¹² No taxes are withheld from scholarships.¹¹³ The NCAA does not allow additional compensation.¹¹⁴

Northwestern football players devote an enormous amount of their time "playing" football. In particular, players devote 40 to 50 hours per week in football-related activities during the season and in pre-season play.¹¹⁵ That commitment reduces to 12 to 25 hours per week in the post-season.¹¹⁶ The players' daily schedule is tightly constrained and divided into four groups: meetings, practices, film sessions, and drills.¹¹⁷

¹⁰⁴ See Susan Rose-Ackerman, *Regulation and the Law of Torts*, 81 AM. ECON. REV. 54, 55 (1991).

¹⁰⁵ See *id.* (quoting *Larsen v. Gen. Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968)).

¹⁰⁶ See *id.* (citing *Wood v. Gen. Motors Corp.*, 865 F.2d 395, 402 (1st Cir. 1989)).

¹⁰⁷ Northwestern Univ., 362 N.L.R.B. No. 167, 2015 WL 4882656, at *2 (Aug. 17, 2015).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at *9; see also *Frequently Asked Questions About the NCAA: Scholarships*, NCAA, <http://www.ncaa.org/about/frequently-asked-questions-about-ncaa> (last visited Mar. 22, 2017).

¹¹⁰ Northwestern Univ., 362 N.L.R.B. at *9.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at *12.

¹¹⁶ *Id.* at *21 n.33.

¹¹⁷ *Id.* at *11–12.

Northwestern football players spend less time in academic-related activities. As students, they attend up to 20 hours in class per week.¹¹⁸ The athletic department provides tutors and study-group programs.¹¹⁹ The department also strongly discourages conflicts with football, thereby suggesting that the football schedule takes priority over course selection.¹²⁰ Ninety-seven percent of all Northwestern football players graduate.¹²¹

Northwestern University, a private, non-profit teaching institution, is an employer under National Labor Relations Act (“NLRA”) section 2(2).¹²² In 2014, Northwestern football players, represented by College Athletic Players Association (“CAPA”), filed a petition for election to determine whether those football players would like to be represented by a union.¹²³ CAPA claimed that the players simply wanted a voice at the table.

Section 158(d) defines the obligation to bargain collectively as:

the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession¹²⁴

This section reveals that employers and unions must bargain “in good faith . . . [over] wages, hours, and other terms and conditions of employment.”¹²⁵ Although unionization typically starts with a particular grievance, here the players had a set of grievances, which could be resolved through bargaining. Players have no control over their schedules, their break times, or their meals.¹²⁶ Indeed, players have little control even over their limited free time.¹²⁷ These are

¹¹⁸ *Id.* at *16.

¹¹⁹ *Id.* at *17–18.

¹²⁰ *Id.* at *17.

¹²¹ *Id.* at *18.

¹²² *Id.* at *3 n.5.

¹²³ Eben Novy-Williams & Scott Soshnick, *Northwestern University Football Players Seek to Form Union*, BLOOMBERG (Jan. 28, 2014, 5:25 PM), <https://www.bloomberg.com/news/articles/2014-01-28/northwestern-university-football-players-seeking-to-form-union>.

¹²⁴ See 29 U.S.C. § 158(d) (2012).

¹²⁵ *Id.*

¹²⁶ *Northwestern Univ.*, 362 N.L.R.B. at *11.

¹²⁷ *Id.* at *11–15.

precisely the types of issues—terms and conditions of the job—that are suited for collective bargaining. Even wages (in the form of scholarship or other types of income) could be negotiated, although such negotiations would have to occur within the context of NCAA rules. To the extent that NCAA rules conflict with the players' right to bargain over wages and other income, it is possible that the Board could decide, with court approval, that those regulations are preempted by the NLRA.

V. WHO'S AN EMPLOYEE?

A. U.S. Law Provides Three Primary Definitions of Employee

In the United States, workers are entitled to rights and protections only if they qualify as employees under a statute or the common law.¹²⁸ For example, only those private-sector workers who qualify as a statutory employee under the NLRA¹²⁹ or the Railway Labor Act¹³⁰ possess free-association rights such as the rights to engage in collective bargaining and concerted activities; public-sector workers must meet those definitions under the Federal Service Labor-Management Relations Statute,¹³¹ or a similar state statute.¹³² In most cases, the term employee is defined in accordance with the purposes of the statute. The NLRA is a significant exception to this rule.

1. The Common-Law Test Emphasizes Control

Most laws for determining whether a worker is an employee for purposes of that law fall into one of three legal tests: the common-law test, the economic-realities test, or the hybrid test.¹³³ The common-law test derives from England's

¹²⁸ Defining the statutory term employee is significant because those labor rights belong “only to those workers who qualify as ‘employees’ as that term is defined in the Act.” *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 89 (1995); see Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199 (2010).

¹²⁹ 29 U.S.C. §§ 151–59 (2012). See generally Ellen Dannin, *Not a Limited, Confined, or Private Matter—Who Is an “Employee” Under the National Labor Relations Act*, 59 LAB. L.J. 5, 5 (2008); Anne Marie Lofaso, *The Vanishing Employee: Putting the Autonomous Dignified Union Worker Back to Work*, 5 FLA. INT'L U. L. REV. 495 (2010) [hereinafter *The Vanishing Employee*].

¹³⁰ 45 U.S.C. §§ 151–65 (2012).

¹³¹ 5 U.S.C. §§ 7101–106, 7111–123, 7131–135 (2012).

¹³² See SETH D. HARRIS, JOSEPH E. SLATER, ANNE MARIE LOFASO & CHARLOTTE GARDEN, *MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS: CASES AND MATERIALS* (2d ed. 2016); PAUL M. SECUNDA, ANNE MARIE LOFASO, JOSEPH E. SLATER & JEFFERY M. HIRSCH, *MASTERING LABOR LAW* (2014).

¹³³ For an excellent summary of these tests, see generally KENNETH G. DAU-SCHMIDT & MICHAEL D. RAY, *THE DEFINITION OF “EMPLOYEE” IN AMERICAN LABOR AND EMPLOYMENT LAW*, http://www.jil.go.jp/english/events/documents/clls04_dauschmidt2.pdf.

master-servant law.¹³⁴ In the United States, the common-law test, codified in the Restatement of Agency, divides workers into servants and independent contractors.¹³⁵ “A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.”¹³⁶ By contrast, at the time that Congress originally enacted the NLRA (Wagner Act)¹³⁷ and the Taft-Hartley amendments of 1947, “[a]n independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking.”¹³⁸ After Taft-Hartley’s enactment, the American Law Institute redrafted the Restatement with results published in 1958, explaining that the following factors are to be considered in determining whether one is a servant or an independent contractor:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.¹³⁹

¹³⁴ See 1 WILLIAM BLACKSTONE, COMMENTARIES *422–32 (1765).

¹³⁵ See RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958).

¹³⁶ See *id.* § 220(1). The original restatement test had slightly different wording. See RESTATEMENT (FIRST) OF AGENCY § 2(2) (AM. LAW INST. 1933) (“A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.”).

¹³⁷ 29 U.S.C. § 151–69 (1935).

¹³⁸ See RESTATEMENT (FIRST) OF AGENCY § 2(3) (AM. LAW INST. 1933).

¹³⁹ See RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. LAW INST. 1958).

The Department of Labor (“DOL”) has published a guide for understanding how these factors are balanced.¹⁴⁰ While the DOL’s guide is not binding on courts or government agencies interpreting the law de novo, the guide helps us to understand the meaning of these factors, which is not always easily intuited. According to the DOL paper, the common-law test is used to determine whether a person is an employee for purposes of several statutes including the NLRA, the Employment Retirement Income Security Act (“ERISA”), federal tax laws, and some insurance laws.¹⁴¹

¹⁴⁰ Charles J. Muhl, *What Is an Employee? The Answer Depends on the Federal Law*, MONTHLY LAB. REV. (Jan. 2002), <http://www.bls.gov/opub/mlr/2002/01/art1full.pdf>.

¹⁴¹ *Id.* at 3, 6.

*Factors Used to Determine a Worker's Status Under the Common-Law Test*¹⁴²

<i>Factor</i>	<i>Worker is an employee if:</i>	<i>Worker is an independent contractor if:</i>
<i>Right to Control</i>	Employer controls details of the work	Worker controls details of the work
<i>Type of Business</i>	Worker is not engaged in business or occupation distinct from employer's	Worker operates in business distinct from employer's business
<i>Supervision</i>	Employer supervises worker	Work is done without supervision
<i>Skill Level</i>	Skill level need not be high or unique	Skill level is specialized, is unique, or requires substantial training
<i>Tools and Materials</i>	Employer provides instrumentalities, tools, and location of workplace	Worker provides instrumentalities and tools of workplace and works at a site other than the employer's
<i>Continuing Relationship</i>	Worker is employed for extended continuous period	Worker is employed for special project or for limited time
<i>Method of Payment</i>	Worker is paid by the hour, or other computation based on time worked is used to determine pay	Worker is paid by the project
<i>Integration</i>	Worker is part of employer's regular business	Work is not part of employer's regular business
<i>Intent</i>	Employer and worker intend to create an employer-employee relationship	Employer and worker do not intend to create an employer-employee relationship
<i>Employment by more than one firm</i>	Worker provides services only to one employer	Worker provides services to more than one business

The main problem with the test is that it is under-inclusive; a worker could be dependent on an employer for that worker's livelihood yet have no employment protection. There should be no wonder that this problem developed. After all, the common-law test was developed to ensure that employers were not unfairly held liable for the torts of their contractors under the doctrine of respondeat superior. Such was the case in the famous British legal controversy

¹⁴² *Id.* at 7.

of *Rylands v. Fletcher*.¹⁴³ There, John Rylands, a businessman who paid an engineer and contractor to design and build a water reservoir on his land, was ultimately held liable for the negligence of those contractors who (unbeknownst to Rylands) chose not properly to block old coal shafts discovered adjacent to Rylands's mine.¹⁴⁴ As a result, the first time Rylands's reservoir was filled it burst and flooded Thomas Fletcher's mine causing considerable damage.¹⁴⁵ As Harvard Law School Dean Ezra Thayer wrote:

The territory within which the doctrine of *Rylands v. Fletcher* may operate is thus bounded on one side by that in which the defendant is excused by the intervention of some new agency which could not be foreseen, and, on the other, by that in which, even if *Rylands v. Fletcher* were altogether repudiated, the defendant would be held by the ordinary principles of negligence. Between these limits is left only the field where the thing which the defendant has collected escapes by its own force acting on existing conditions without negligence of the defendant. Such an intermediate ground no doubt exists; but it is a little space.¹⁴⁶

By contrast, the Supreme Court, in rejecting application of the common-law test to the Wagner Act, wrote:

The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to "employees" within the traditional legal distinctions separating them from "independent contractors." Myriad forms of service relationship [sic], with infinite and subtle variations . . . blanket the nation's economy. . . . Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute's purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation.¹⁴⁷

¹⁴³ [1868] HL 330 (Eng.).

¹⁴⁴ *Id.* at 337–42.

¹⁴⁵ *Id.* at 331–32.

¹⁴⁶ Ezra Ripley Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801, 804–05 (1916). This article was published posthumously.

¹⁴⁷ *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 126–27 (1944).

A good example of the borderline case is the newsboy.¹⁴⁸ The Supreme Court captures their vulnerability in *NLRB v. Hearst Publications, Inc.*:

The newsboys work under varying terms and conditions. They may be “bootjackers,” selling to the general public at places other than established corners, or they may sell at fixed “spots.” They may sell only casually or part-time, or full-time; and they may be employed regularly and continuously or only temporarily. The units which the Board determined to be appropriate are composed of those who sell full-time at established spots. *Those vendors, misnamed boys, are generally mature men, dependent upon the proceeds of their sales for their sustenance, and frequently supporters of families. Working thus as news vendors on a regular basis often for a number of years, they form a stable group with relatively little turnover, in contrast to schoolboys and others who sell as bootjackers, temporary and casual distributors.*¹⁴⁹

The Court concluded that when such workers are characterized by qualities such as “inequality of bargaining power,” have the capacity to “interrupt[] . . . commerce through strikes and unrest,” and would benefit from collective bargaining, the “appropriate test for coverage” may be something more akin to an economic-realities test:

[W]hen the particular situation of employment combines these characteristics, so that *the economic facts of the relation make it more nearly one of employment than of independent business enterprise* with respect to the end sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute’s objectives and bring the relation within its protections.¹⁵⁰

In his seminal article, Professor Harry Arthurs popularized the term dependent contractor, coined by a Swedish scholar writing in English.¹⁵¹ By that term, Professor Arthurs meant “legally independent but economically dependent

¹⁴⁸ This may not actually be a close case, especially because the Board threw out the bootjackers (workers who sold extras occasionally). *Id.* at 132. Inclusion of the bootjackers would have made this a closer case. This Paper uses the example here because the Supreme Court characterized it as a close case and because it is the case that the provoked Congress to create the independent-contractor exemption.

¹⁴⁹ See *id.* at 115–16 (emphasis added).

¹⁵⁰ *Id.* at 127–28 (emphasis added).

¹⁵¹ See H. W. Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*, 16 U. TORONTO L.J. 89, 89 n.1 (1965) (citing SCHMIDT, *THE LAW OF LABOUR RELATIONS IN SWEDEN* (1962)).

contractors.”¹⁵² Simply put, a test devised primarily for determining whether an employer has sufficient control over his agent for the law to impose liability for the agent’s action is not well suited for determining whether a worker is sufficiently dependent on his employer for his livelihood to determine whether that employee would benefit from collective bargaining. This is where the economic-realities test comes into play.

2. The Economic-Realities Test Emphasizes the Worker’s Economic Dependency on the Employer

The DOL uses the economic-realities test primarily to determine whether a person is an employee for purposes of the Fair Labor Standards Act (“FLSA”); that is, to determine whether an employer should be subject to providing its workers with minimum wage and overtime protection.¹⁵³ That statute defines employee as “any individual who is employed by an employer,”¹⁵⁴ where “[e]mploy includes to suffer or permit to work.”¹⁵⁵ The Supreme Court fleshed out this vague definition in *Rutherford Food Corp. v. McComb*,¹⁵⁶ noting the purpose of the FLSA—“to lessen . . . the distribution in commerce of goods produced under subnormal labor conditions.”¹⁵⁷ There, the Court easily concluded that meat boners who worked for a slaughterhouse were employees for FLSA purposes even though they owned the tools of their trade and were paid collectively by the amount of meat boned.¹⁵⁸ The Court examined the workers’ economic dependence on the employer rather than the formality of their work agreement.¹⁵⁹ As the current DOL guide states, under this test, an “employment relationship exists if [the] individual is economically dependent on a business for continued employment.”¹⁶⁰ In that vein, the Court agreed with the lower court that these workers were employees entitled to the wage and hour protections of the FLSA because they worked alongside undisputed employees toward a common purpose, the production of boneless beef.¹⁶¹

¹⁵² See *id.* at 109–10.

¹⁵³ See *infra* note 161 and accompanying text.

¹⁵⁴ 29 U.S.C. § 203(e) (2012).

¹⁵⁵ See *id.* § 203(g).

¹⁵⁶ 331 U.S. 722 (1947).

¹⁵⁷ *Id.* at 727.

¹⁵⁸ *Id.* at 730.

¹⁵⁹ *Id.*

¹⁶⁰ Muhl, *supra* note 140, at 6 exhibit 1.

¹⁶¹ *Rutherford Food*, 331 U.S. at 726.

*Factors Used to Determine a Worker's Status Under the Economic-Realities Test*¹⁶²

<i>Factor</i>	<i>Worker is an employee if —</i>	<i>Worker is an independent contractor if —</i>
<i>Integration</i>	Worker provides services that are a part of the employer's regular business	Worker provides services outside the regular business of the employer
<i>Investment in Facilities</i>	Worker has no investment in the work facilities and equipment	Worker has a substantial investment in the work facilities and equipment
<i>Right to Control</i>	Management retains a certain type and degree of control over the work	Management has no right to control the work process of the worker
<i>Risk</i>	Worker does not have the opportunity to make a profit or incur a loss	Worker has the opportunity to make a profit or incur a loss from the job
<i>Skill</i>	Work does not require any special or unique skills or judgment	Work requires a special skill, judgment, or initiative
<i>Continuing Relationship</i>	Worker has a permanent or extended relationship with the business	Work relationship is for one project or a limited duration

This test cures the problems of the common-law test, which was designed for a very different purpose. It allows dependent contractors to come within the protective ambit of labor and employment laws by asking courts and other reviewing tribunals to examine the actual relationship between the employer and employee, for the purpose of determining whether there is an imbalance of power between the two.

3. The Hybrid Test Examines the Totality of the Circumstances

Under the Hybrid Test, which is used primarily to determine whether a person is an employee for purposes of Title VII and other discrimination statutes, the “[e]mployment relationship is evaluated under both common-law and economic reality test factors, with a focus on who has the right to control the means and manner of a worker’s performance.”¹⁶³

¹⁶² Muhl, *supra* note 140, at 8 exhibit 3.

¹⁶³ *Id.* at 6 exhibit 1.

B. The Strange Case of the NLRA Definition of Employee

The NLRA, which was front and center in the Northwestern labor dispute, has an odd relationship with these tests. Because, as explained below, the NLRA defines employees as all employees unless otherwise exempted,¹⁶⁴ and because reviewing courts generally defer to the NLRB on matters that Congress entrusted to the NLRB's administrative expertise,¹⁶⁵ the courts have historically given the Board a long leash when interpreting the NLRA, including when it construes the statutory definition of employee.¹⁶⁶

There are some unique limitations on the Board's otherwise expansive authority to construe the statutory term employee. First, there are statutory limits. For example, as explained more fully below, the definition's structure in itself compels a two-part construction with a broad affirmative definition constrained by several exemptions, which this Paper calls the negative definition. While the Board has power broadly to construe the affirmative definition, it is without power to read into the NLRA a new exemption¹⁶⁷ or read out of the NLRA one of the exemptions.¹⁶⁸ Second and relatedly, the Supreme Court has held that the Board must use the common-law definition of independent contractor when construing that term.¹⁶⁹ Because the common-law definition of independent contractor is inextricably interwoven with the common-law definition of employee, the common-law definition is ever lurking in the Board's analysis of the gateway jurisdictional question, who is an employee. This shadow definition of employee creates an odd tension between the administrative law principle that reviewing courts must defer to the NLRB's reasonable and permissible construction of the NLRA, and the Court's command that the Board must use the

¹⁶⁴ 29 U.S.C. § 152(3) (2012).

¹⁶⁵ See generally *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–44 (1984).

¹⁶⁶ See, e.g., *Bell Aerospace*, 219 N.L.R.B. 384, 385–86 (1975) (defining managerial exemption on remand from Supreme Court case, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), directing the Board to clarify the definition of this exemption, on which the NLRA is silent); *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946) (holding that confidential workers are not statutory employees and defining confidential workers as those who “assist and act in a confidential capacity to persons who exercise ‘managerial’ functions in the field of labor relations,” thereby creating the labor-nexus test). The Supreme Court subsequently upheld the Board's labor-nexus test. See *NLRB v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170, 189–92 (1981) (holding that confidential employees who have access to confidential personnel information are exempted from NLRA coverage).

¹⁶⁷ See *NLRB v. Health Care & Ret. Corp.*, 511 U.S. 571, 577–78 (1994) (rejecting the Board's attempt to read certain nurse supervisors out of the NLRA by construing “in the interest of the employer” prong of the supervisory exemption too narrowly).

¹⁶⁸ See *id.*

¹⁶⁹ See *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

common-law definition of independent contractor as its starting point for determining whether a worker fits into that exemption.¹⁷⁰

In concrete terms, the Board, with court approval, has recognized the broad, albeit circular, definition of the term employee, statutorily defined as “any employee” regardless for whom they worked and even if they were on strike:

The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless the [Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment[.]¹⁷¹

In a previous article, I explained that this part of the definition of employee could be written as follows:

$$EE = [\text{any EE} + \sim (\text{EEs of particular ER}) + \text{strikers}]^{172}$$

But we can further simplify this equation. In the context of a labor dispute between management and its unionized engineers who distributed pro-labor literature asking their colleagues not only to support the union but also to oppose a state constitutional amendment incorporating right-to-work principles and to petition their congressional representatives to vote in favor of the federal minimum wage law, the Supreme Court in *Eastex, Inc. v. NLRB*¹⁷³ reaffirmed that the NLRA protects workers A, who advance the interests of workers B, so long as A are statutory employees.¹⁷⁴ The Court held that this was so even if, as here, the interests advanced, minimum wage law, had no effect on A, as was the case here, where A were engineers who earned far in excess of the minimum wage.¹⁷⁵ Accordingly, to simplify this equation, I substitute WC (meaning working class) for \sim (EEs of particular ER). The equation now reads:

$$EE = [\text{any EE} + WC + \text{strikers}]$$

¹⁷⁰ Compare *Chevron*, 467 U.S. at 842–44 with *United Ins. Co.*, 390 U.S. at 256.

¹⁷¹ 29 U.S.C. § 152(3) (2012); see *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891–92 (1984) (accepting the Board’s construction of the statutory definition of employee and describing it as “striking[ly]” broad); see also *Atl. Greyhound Corp.*, 7 N.L.R.B. 1189, 1196 (1938) (“The statutory definition is of wide comprehension.”); *Hearst Publ’ns, Inc.*, 9 N.L.R.B. 1262, 1274 (1938) (stating that the statutory definition of employee has a “wide scope”).

¹⁷² See *The Vanishing Employee*, *supra* note 129, at 501–03.

¹⁷³ 437 U.S. 556 (1978).

¹⁷⁴ *Id.* at 564–65, 574.

¹⁷⁵ *Id.* at 556.

From the very beginning, the Board with court approval upheld a broad variety of workers as falling within this broad statutory definition.¹⁷⁶ Indeed, the only workers who were not protected were those who specifically fell within one of the NLRA's exemptions: agricultural workers, domestic services, family members who work for their parent or spouse, government workers (who are, in theory, protected under the Federal Labor-Management Relations Statute or corresponding state law), and those who were already protected under the Railway Labor Act. With the Taft-Hartley amendments in 1947, those exempted from the NLRA also included supervisors and independent contractors. The full definition of employee is therefore:

any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, *but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.*¹⁷⁷

With those exemptions, the statutory definition thus has two components, a positive and negative component, which can be written as follows:

$$EE = [\text{any EE} + \text{WC} + \text{strikers}] - [\text{AW} + \text{DS} + \text{FAM} + \text{IC} + \text{Sup} + \text{RLA} + \text{Gov}]$$

Significantly, no exemptions apply to the case of the Northwestern football players. We are, therefore, only dealing with the affirmative definition of the term.

¹⁷⁶ See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416, 430 (1947) (deputized plant guards); *NLRB v. E. C. Atkins & Co.*, 331 U.S. 398, 404–12 (1947) (private plant guards, who are required to be civilian auxiliaries to the U.S. Army's military police); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 191–92 (1941) (job applicants); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938) (unfair labor practice and economic strikers).

¹⁷⁷ 29 U.S.C. § 152(3) (2012) (emphasis added).

C. Northwestern's Football Players Are Statutory Employees Under the NLRA

The Board's Regional Director was the first to examine the Northwestern case, applying the common-law servant definition as the appropriate legal standard, under which an employee is (1) "a person who performs services for [an employer] under a contract [to] hire" for those services, (2) subject to the employer's "control or right of control," and (3) "in return for payment."¹⁷⁸ Here, the football players readily satisfy all three conditions. First, the players perform valuable services for Northwestern, an undisputed employer under the NLRA. Those services generated \$235 million between 2003 and 2012, primarily from TV contracts, merchandise sales, and licensing agreements.¹⁷⁹ Second, reviewing condition three, the players received compensation for their services in the form of scholarships. The real question here is not whether the players received compensation; indeed, some did not.¹⁸⁰ The question is whether the players performed a valuable service that is amenable to compensation; otherwise, those placed in involuntary servitude would technically not meet the definition of employee, leading to the absurd result that such servants are not workers entitled to labor law's protections.

The final question, noted as factor (2) above, is whether the players are subject to the employer's (or its agents') control. Here, there can be no doubt that they are. The players must follow their coaches' daily itineraries from 5:45 AM to 10:30 PM.¹⁸¹ They spend 50 to 60 hours per week on football-related activities.¹⁸² Their coaches' control location, duration, and manner in which the players execute their football duties.¹⁸³ Moreover, Northwestern routinely violated NCAA regulations limiting countable athletically related activities hours during the season to 20 hours per week, and 4 hours per day.¹⁸⁴

The NCAA, which may very well be a joint employer because of its heavy-handed regulation of the sport, objected to these findings, making four

¹⁷⁸ Northwestern Univ., 362 N.L.R.B. No. 167, 2015 WL 4882656, at *19 (Aug. 17, 2015). As explained above, the common-law servant test is the flip side of the common-law independent test. Accordingly, instead of using the Restatement's multi-factored test for determining whether the university had insufficient control over the players such that the players were really independent contractors, the Regional Director reviewed whether the employer had sufficient control over the players to determine whether those players were servants. Given that the football players meet this test, they would easily meet the economic-realities test, as the students were completely dependent on the university to meet their basic needs. *See id.* at *13.

¹⁷⁹ *Id.*

¹⁸⁰ *See id.* at *14. The Board only considered whether scholarship players were employees, and therefore the case technically does not present this question.

¹⁸¹ *Id.* at *20.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at *15–17.

primary arguments, only one of which is legal. First, the NCAA claims that Congress did not intend for scholar-athletes to be statutory employees.¹⁸⁵ This argument is a red herring for a number of reasons. College football in the 1930s was very different from what it is today.¹⁸⁶ Although it was already well on its way to being a commercialized enterprise, student-athletes still maintained much of their student status up until the 1950s. Relatedly, the NCAA argued that the scholar-athletes should not be treated as employees for purposes of the NLRA because they are not treated as employees for purposes of any other statute.¹⁸⁷ This argument, at best, suggests that the tribunal consider whether there is a common policy or legal thread running through these various statutes for why student-athletes should not be treated as employees. At worst, it suggests that the student-athletes are potentially being exploited in many additional ways, such as minimum wage and maximum hour violations.

Second, the NCAA argued that scholarship is financial aid, not remuneration for services rendered.¹⁸⁸ As explained above, that argument is irrelevant because the question is not whether the athletes are compensated but whether they can or should be compensated. This distills to the question whether the athletes are performing valuable services for the employer.

Third, the NCAA argued that the NLRB Regional Director, who drafted the Decision and Direction of Election in *Northwestern*, applied the wrong test.¹⁸⁹ In its view, the common-law right to control test is not the correct test for determining employee status under the NLRA.¹⁹⁰ Instead, the correct test is the narrower test: whether the students' relationship with the university is "primarily an educational one, rather than an economic one."¹⁹¹

There are many responses to this argument. Chief among them is that under any standard test—common law, economic realities, hybrid—these football players are employees, leaving the policy question, whether the Board should exercise its jurisdiction over these workers, the only question open for the Board to decide. Putting the policy argument aside for the moment, the primary-nature-of-the-relationship test does present a much closer call for which there are, once again, two responses. First, under the facts of this case (and likely the

¹⁸⁵ See Brief of Amicus Curiae Nat'l Collegiate Athletic Assoc. in Support of Northwestern Univ. at 5–10, Northwestern Univ., 362 N.L.R.B. No. 167 (No. 13-RC-121359), 2015 WL 4882656 (Aug. 17, 2015).

¹⁸⁶ See generally George Will, *Commercialization Rampant in College Football*, NEWSMAX (Jan. 7, 2010, 10:52 AM), <http://www.newsmax.com/GeorgeWill/GeorgeWill-NCAA-football-ESPN/2010/01/07/id/345662/>.

¹⁸⁷ See Brief of Amicus Curiae Nat'l Collegiate Athletic Assoc. in Support of Northwestern Univ., *supra* note 185, at 5–10.

¹⁸⁸ See *id.* at 12–14.

¹⁸⁹ See *id.* at 10–12.

¹⁹⁰ *Id.*

¹⁹¹ Brown Univ., 342 N.L.R.B. 483, 489 (2004).

facts of most Division IA teams) the football players satisfy the primary-nature-of-the-relationship test, because these players spend most of their time playing football, thereby earning hundreds of millions of dollars for their employers.¹⁹² In all fairness, however, given the devastating ways in which the Board has utilized this test, it is not clear whether even a liberal Board would make such a finding.¹⁹³ Second, and more importantly, the Board should abandon this test because it fails to give effect to the purposes of the NLRA, which is to encourage the practice and procedure of collective bargaining for a broad set of workers.¹⁹⁴

A third response to this argument is worth pressing the pause button. Is the primary-relationship test just another way of stating the economic-realities test? And if so, is the Board legally constrained from using that test in determining employee status, just as it is not permitted to use that test for determining independent-contractor status? This is the conundrum posed by the curious administrative rules that govern the NLRA's interpretation. Although the Board has primary responsibility for construing the NLRA and the definition of employee, in particular, and although the Board's permissible construction of that term is entitled to deference, the Board is not permitted to construe the statutory term "independent contractor" in any manner that is inconsistent with the common-law test. The Board's only constraint in construing the term employee is that its findings be consistent with the NLRA's broad language. To the extent that the primary relationship test narrows the NLRA's broad language it is inconsistent with the statutory language, and reviewing courts should strike that construction as contrary to the Act's plain language.

This leaves one last argument, which permeates the NCAA's brief.¹⁹⁵ Student-athletes do not comport with a common-sense understanding of what constitutes an employee.¹⁹⁶ This argument deserves special attention, covered in the following section, as it raises important concerns about how best to protect children and young adults.

¹⁹² See *supra* note 178–79 and accompanying text.

¹⁹³ See, e.g., *Toering Elec. Co.*, 351 N.L.R.B. 225, 225 (2007) (finding that salts, paid union organizers, are not statutory employees where they do not intend to accept a job if offered); *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982, 982–84 (2004) (finding mentally challenged workers as not statutory employees because their work relationship was primarily rehabilitative rather than economic in nature and citing earlier cases for the same proposition); *Brown Univ.*, 342 N.L.R.B. at 492 (finding that graduate teaching or research assistants are not statutory employees because those teachers and researchers are primarily students).

¹⁹⁴ 29 U.S.C. § 151 (2012); see also *National Labor Relations Act*, NLRB, <https://www.nlrb.gov/resources/national-labor-relations-act> (last visited Mar. 22, 2017).

¹⁹⁵ See generally Brief of Amicus Curiae Nat'l Collegiate Athletic Assoc. in Support of Northwestern Univ., *supra* note 185.

¹⁹⁶ *Id.*

VI. POTENTIAL PROBLEMS WITH TREATING COLLEGE
ATHLETES AS EMPLOYEES FOR PURPOSES OF COLLECTIVE BARGAINING

It is difficult to find a definition of student-athlete in the literature. One definition that seems to fit most instances is the following:

The term “student athlete” means an individual who engages in, is eligible to engage in, or may be eligible in the future to engage in, any intercollegiate sport. An individual who is permanently ineligible to participate in a particular intercollegiate sport is not a student athlete for purposes of that sport.¹⁹⁷

A student-athlete then is a status—one who is eligible to play intercollegiate sport either now or in the future as a student-athlete. Accordingly, NCAA and college regulations focus heavily on eligibility. These eligibility rules give a good idea of what constitutes a student-athlete for purposes of the law.

As explained above, the NCAA did make one intriguing argument: The common-sense image of scholar-athletes is that they are not employees.¹⁹⁸ This statement may be true, but not for the reasons that the NCAA or the various Division I football universities may advance. These parties advance the myth that these athletes are students first, athletes second, and that they are amateur rather than professional athletes. We willingly suspend our disbelief and mindlessly adhere to the mythical ideal of the student-athlete as someone who is equally parts student and athlete, no more, no less. But as the definition above suggests, a student-athlete is merely one who is eligible to play sport.¹⁹⁹ There is nothing in this definition about the importance of education.²⁰⁰ As one review observed:

This characterization—that athletes at NCAA-member schools are student-athletes—is essential to the NCAA because it obscures the legal reality that some of these athletes, in fact, are also employees. By creating and fostering the myth that football and men’s basketball players at Division I universities are something other than employees, the NCAA and its member institutions obtain the astonishing pecuniary gain and related benefits of the athletes’ talents, time, and energy—that is, their labor—while severely curtailing the costs associated with such labor. The advantages to these institutions from fixing and

¹⁹⁷ 15 U.S.C. § 7801(9) (2012).

¹⁹⁸ See *supra* notes 177–84 and accompanying text.

¹⁹⁹ See *supra* note 197 and accompanying text.

²⁰⁰ See *supra* note 197 and accompanying text.

suppressing labor costs in this manner have enabled them to reap a fantastic surfeit of riches.²⁰¹

Whether these players are students, athletes, or student-athletes, and whether they are amateurs or professional employees, their universities, either as employers or fiduciaries, have certain duties to provide them with: sufficient food to sustain their enormous bodies, a healthy and safe environment, courses and time to study, and leisure time sufficient for their mental health needs. Power Five Football has shown itself as often disregarding these duties. These students, as the *Northwestern* case demonstrates, were often hungry, had tightly constrained schedules, and spent most of their time with their teammates rather than forging other friendships that are so vital for young-adult mental health.²⁰² There is also the problem that at least some coaches—as the Frostburg State case indicates—are ignoring the fact that their players are sustaining multiple concussions, often immediately life-threatening, and if not imminently life-threatening, then potentially life-shortening.²⁰³ Finally, there is the problem of financial exploitation, not only in the form of ticket sales and television revenue, but in the form of inappropriate image appropriation.²⁰⁴

These circumstances suggest that the sport should be regulated at both the youth and college levels. To be sure, the sport is already highly regulated, mostly by the NCAA. But the NCAA is part of the structural exploitation of these players. Therefore, to eliminate or at least lessen exploitation, regulation must come from outside the system in the form of legal regulation. Rather than permitting classic collective bargaining, which would rely on market pressures to fix these problems, the government should regulate the sport in the following ways. First, it could make student-athletes eligible for workers' compensation and thus fix one of the problems—college athletic injury rates—with the solution that started it all:

Today, much of the NCAA's moral authority—indeed, much of the justification for its existence—is vested in its claim to protect what it calls the student-athlete. The term is meant to conjure the nobility of amateurism and the precedence of scholarship over athletic endeavor. But the origins of “student-athlete” lie not in a disinterested ideal but in a sophistic formulation designed, as the sports economist Andrew Zimbalist has written, to help the NCAA in its “fight against workers' compensation insurance

²⁰¹ Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 74 (2006).

²⁰² See *Friendships: Enrich Your Life and Improve Your Health*, MAYO CLINIC, <http://www.mayoclinic.org/healthy-lifestyle/adult-health/in-depth/friendships/art-20044860> (last visited Mar. 22, 2017).

²⁰³ See *supra* Part IV.

²⁰⁴ See *supra* note 90 and accompanying text.

claims for injured football players.”

“We crafted the term *student-athlete*,” Walter Byers himself wrote, “and soon it was embedded in all NCAA rules and interpretations.” The term came into play in the 1950s, when the widow of Ray Dennison, who had died from a head injury received while playing football in Colorado for the Fort Lewis A&M Aggies, filed for workers’-compensation death benefits. Did his football scholarship make the fatal collision a “work-related” accident? Was he a school employee, like his peers who worked part-time as teaching assistants and bookstore cashiers? Or was he a fluke victim of extracurricular pursuits? Given the hundreds of incapacitating injuries to college athletes each year, the answers to these questions had enormous consequences. Critically, the NCAA position was determined only by its member institutions—the colleges and universities, plus their athletic conferences—as students themselves have never possessed NCAA representation or a vote. Practical interest turned the NCAA vigorously against Dennison, and the Supreme Court of Colorado ultimately agreed with the school’s contention that he was not eligible for benefits, since the college was “not in the football business.”²⁰⁵

Workers’ compensation should be coupled with a robust health insurance scheme that covers typical sport injuries, such as concussions, as well as dietary education. An independent committee should be put together to study and report the question whether these athletes might also be covered for certain illnesses post-college career. This would be akin to covering retiree benefits. This coverage should extend for the duration of the student-athlete’s status as an enrolled student, given the long-term health issues that often accompany sport injuries.

Second, players should be compensated for all image appropriation used in video games and in other instances. As this is already occurring, I only touch upon it for completeness’ sake.²⁰⁶

Third, there must be a culture change. We must accept that if we are going to keep a student-athlete model for all or some of these students, then the students must be treated 100% as students with all the obligations and

²⁰⁵ Taylor Branch, *How the Myth of the NCAA “Student Athlete” Was Born*, DEADSPIN (Feb. 2, 2014, 1:35 PM), <http://www.deadspin.com/how-the-myth-of-the-ncaa-student-athlete-was-born-1524282374> (quoting TAYLOR BRANCH, *THE CARTEL: INSIDE THE RISE AND IMMINENT FALL OF THE NCAA* (Byliner 2011)).

²⁰⁶ Steve Berkowitz, *Checks Are in the Mail for College, Pro Athletes in Video Games Suit*, USATODAY (Apr. 7, 2016, 7:31 PM), <http://www.usatoday.com/story/sports/ncaaf/2016/04/06/electronic-arts-video-game-collegiate-licensing-lawsuit/82725984/>.

privileges/rights of students. That means the privilege of choosing their major and their courses without interference from football coaches.

Fourth, significant thought must be given to whether a minor league for football should be created. As discussed above, some of the most significant problems with the college football system result from the monopsony power held by the Power Five Conference member universities and the fact that there are no alternatives for those who wish to play football.²⁰⁷

Finding a solution for the fifth issue, whether and how to revenue share, is difficult and not readily discernible. Universities as businesses have an interest in using revenue in a manner that they believe is not only in the best interest of the university but also in a manner compatible with their business models.²⁰⁸ The question here is what type of more equitable revenue sharing would make sense for both parties.

This brings up the role for unions. Unions such as CAPA could be elected by the students for several purposes. First, unions could also form a bargaining committee to bargain, on behalf of players, with the university and the NCAA in a tripartite structure that would set terms for college football. These terms could be set for a fixed interval, say three to five years. The agreement would take the form of an industry-wide master agreement for all college football players. An industry-wide master agreement would alleviate the problem of competition, discussed above. Relatedly, the tripartite structure could review revenue sharing. Some of this sharing could, of course, include scholarships for all who play football. But it could also include provisions for sufficient food for all players to keep them healthy, and solutions regarding other typical bargaining subjects, rather than those issues being set unilaterally by each team. Second and relatedly, the students could be permitted to form a safety committee in which they would receive union representation. There are many models for this type of committee, coal mine safety committees being one such model.

VII. CONCLUSION

The main two goals for this Paper have been, first, to unravel, to some extent, the socio-legal structural issues that facilitate exploitation of our youth and college football players; and second, to present some possible remedies for those problems. With respect to unraveling some socio-legal structure problems with college football, I present two observations and one legal argument. Initially, I describe some of the structural problems of youth and college football, which include (1) tolerance for violence on and off the field; and (2) movement away from amateurism and toward increased commercialization with (3) no significant payoff for more than 99% of young athletes who play high school and college football. This situation is exacerbated by the perpetuation of the student-

²⁰⁷ See *supra* note 5 and accompanying text.

²⁰⁸ See *supra* note 65 and accompanying text.

athlete myth, the monopsony power held by Power Five universities, and a refusal by lawmakers to respond to these inequities and market failures with regulations. This Paper next reviews two recent news accounts that vividly tell this story of brutality and commercialization: (1) the case of Derek Sheely, a fullback for Frostburg State's football team, who collapsed from a concussion he received during Oklahoma drills, which resulted in Derek's death; and (2) the case of Northwestern football players organizing so that they could have input into the sport that dominates their college lives. It then argues that Northwestern's football players (and, for that matter, many college football players) are employees under the NLRA and indeed under any of the three legal definitions of employee that permeate United States law. The Paper shows, however, that this answer does not sit well with most of us because we do not believe that student-athletes either are or should be paid professional employees.

The Paper's main point is that the NCAA and its member universities should not be permitted to have it both ways. They should not be permitted to treat their football players as professional employees but then appeal to a mythical ideal of the student-athlete to convince us that these students are not professional employees but merely amateur athletes who are primarily seeking an education. This look-the-emperor-has-no-clothes moment exposes the deep exploitation that these college athletes suffer not only at the hands of their university employers and the NCAA but also at the hands of legal institutions that remain blind to the truth about this exploitation. The Paper concludes with a discussion of possible changes that could remedy this deep exploitation.

The commercialization and professionalization of college football has been evolving for over a century.²⁰⁹ Given the promise of huge revenue streams, at least for the universities that comprise the Power Five conferences, it is unlikely that college football will revert to an amateur status any time soon.²¹⁰

The ideal of the college athlete, like the unheard melodies of the Grecian urn, is sweeter than the reality.²¹¹ The question for us is whether we can bring

²⁰⁹ See generally Will, *supra* note 186.

²¹⁰ See generally Paula Lavigne, *Rich Get Richer in College Sports as Poorer Schools Struggle to Keep Up*, ESPN (Sept. 6, 2016), http://www.espn.com/espn/otl/story/_/id/17447429/power-5-conference-schools-made-6-billion-last-year-gap-haves-nots-grows.

²¹¹ John Keats, *Ode on a Grecian Urn*, POETRY FOUND., <http://www.poetryfoundation.org/poems-and-poets/poems/detail/44477> (last visited Feb. 23, 2017):

Heard melodies are sweet, but those unheard
Are sweeter; therefore, ye soft pipes, play on;
Not to the sensual ear, but, more endear'd,
Pipe to the spirit ditties of no tone:
Fair youth, beneath the trees, thou canst not leave
Thy song, nor ever can those trees be bare;
Bold Lover, never, never canst thou kiss,

reality—student exploitation—closer to the ideal—student-athlete—or, like the Grecian urn, is the ideal student-athlete destined to remain a mythical creature always yearning for gratification yet never completely satiated. If only mythical, then it becomes important to accept reality, and to break down collectively the structures that permit these institutions to exploit young athletes.

Though winning near the goal yet, do not grieve;
She cannot fade, though thou hast not thy bliss,
For ever wilt thou love, and she be fair!

